

Presentation to AFSCME Council 40 Staff Meeting
September 11, 2009 – Ostoff Resort, Elkhart Lake, Wisconsin

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(The speaker's remarks do not necessarily reflect the views of the WERC.)

I. What's new (or little known) about the WERC?

A. Statute changes

- 2009 WI Act 21 – expired cba fair share/grievance arb given effect during hiatus
- 2009 WI Act 28 state budget
 - QEO repealed, teacher bargains treated same as other school bargains
 - school contracts max duration extended to 4 years
 - school interest arb criteria modified – greatest/greater weight factors gone
 - school unit combinations by self-determination elections authorized
 - UW faculty and academic staff bargaining law created, similar to SELRA
 - SELRA research assistant unit certification without election authorized
 - various provisions regarding home care provider unit and bargaining
- 2009 WI Act 34 – teacher prep time becomes mandatory subject July 2011

B. Commissioner statuses

- Commissioner Susan Bauman confirmed for 6-yr term expiring March 2011
- Chair Judy Neumann confirmed for 6-yr term expiring March 2013
- Commissioner Paul Gordon currently holds over in term expiring March 2009

C. Staff changes

- active now: 14 staff attorneys (9 in Madison and 5 out-state) and 4.5 support staff
- Karen Mawhinney retired; Michael O'Callaghan resigned; vacancy to be filled
- Sharon Gallagher retired; being replaced by John Carlson, starting on 9/14/2009
- State budget authorizes two additional positions July 2010 – funding uncertain
- Stuart Levitan - part-time until 1/1/2010.

D. State Service-wide furloughs

- 8 unpaid staff furlough days in fiscal year 2009-10, and 8 more in 2010-11
- office closed 2009 and 2010: Columbus Day; and Friday after Thanksgiving
- office closed 2010 and 2011: President's Day; and Friday before Memorial Day

E. Ad Hoc Roster additions

- Michael Wojcik, Naperville IL, retired HR professional – added Jan 2009
- Charles Boldt, Urbandale Iowa, former Iowa PERB staffer – added Jan 2009
- Eugene Jensen, Hudson, retired HR professional – added May 2009
- Karen Mawhinney, Elkhorn, former WERC staffer – added May 2009
- Sharon Gallagher, Oshkosh, former WERC staffer – added Aug 2009

-Charles Hoornstra, Madison, frmr. Asst. AG, WERC Comm'r -- added Aug 2009

F. Filing fees and fee policies

- Filing fees rose January 2, 2008; continue to fund five attorney positions.
- \$100 unfair labor practice/prohibited practice complaint cases.
- \$800 (split equally between union and employer) for mediation, interest arbitration and fact-finding cases.
- \$800 (split equally between union and employer) for grievance arbitration cases where WERC staff or commissioners serve as arbitrators.
- Still no fee for election, unit clarification, referendum and declaratory ruling cases and no fee for requesting a panel of arbitrators who are not WERC staff or commissioners.
- fees not refundable except where non-initiating party won't participate in gr arb
- multiple unrelated events/occurrences require multiple gr arb cases/filing fees
- one mediation fee can cover unrelated event/occurrences if mediated at same mtg
- separate fee per unit necessary for multiple interest arb certifications/orders
- single complaint fee covers multiple events/occurrences and valid amendments
- "counter-complaint" requires separate complaint filing fee

G. Agency responses to budget and workload changes

- continued aggressive complaint and representation case conciliation
- encourage staff to utilize pre-hearing conferences
- encourage staff and parties to use e-mail
- encourage parties to utilize expedited grievance arbitration procedures
- heavy emphasis on individual written work timeliness:
 - 90 days from closing arguments for grievance awards
 - 60 days from closing arguments for complaint decisions
 - 60 days from closing arguments for unit clarifications drafts
 - 30 days from closing arguments for election case drafts
 - 30 days from closing args for bargaining scope declaratory ruling drafts
 - 30 days from closing arguments for rulings on miscellaneous motions
- continued emphasis on Commission written work timeliness:
 - 60 days from receipt of draft in unit clarification cases
 - 45 days from closing arguments for complaint reviews
 - 30 days from receipt of draft in election cases
 - 15 days from receipt of draft in bargaining scope declaratory ruling cases

H. Joint request policies

- joint requests for mediator or grievance arbitrator honored if requestee available
- unilateral requests ordinarily not honored/considered
- staff permitted to accept/not accept/condition acceptance of joint requests

I. Case assignment tendencies

- mediator assigned one unit is usually assigned other units of same employer
- staff not ordinarily assigned to mediate when hearing case with same employer
- staff not ordinarily assigned to hearing case when mediating with same employer

- unit clarifications usually assigned to Commissioners
- election cases usually assigned to General Counsel
- declaratory ruling hearings assigned to General Counsel

J. Panel selection procedures

- computer selects from among those who are available when panel created
- computer attempts to equalize number of times name sent out per time available
- general employee interest arbitration – one out-state, six WI; or 7 WI
- police-fire interest arbitration – one out-state, four Wisconsin
- ad hoc grievance arbitrations – one out-state, the rest Wisconsin
- staff grievance arbitrations – Chair determines who is available from time to time

II. A closer look at the complaint process

A. The Basics of Complaint Case Processing

- 1 -- PROHIBITED PRACTICES / UNFAIR LABOR PRACTICES DEFINED
- 2 -- PARTIES
- 3 -- YOUR RIGHT TO BE REPRESENTED
- 4 -- THE COMPLAINT
- 5 -- SETTLEMENT
- 6 -- PERSON CONDUCTING HEARING
- 7 -- COMMUNICATING WITH THE HEARING EXAMINER
- 8 -- THE ANSWER
- 9 -- PRE-HEARING CONFERENCE AND RULINGS
- 10 -- COMPELLING WITNESS TESTIMONY / DOCUMENT PRODUCTION
- 11 -- AN INTERPRETER OR OTHER ACCOMMODATION
- 12 -- RESCHEDULING, CONTINUING, ADJOURNING
- 13 -- THE HEARING
 - a. Importance of Appearing at the Hearing
 - b. How a Hearing is Conducted
 - c. Evidence
 - d. Closing Arguments
 - e. Transcript
- 14 -- THE DECISION
- 15 -- REVIEW AND APPEAL
- 16 -- APPENDIX
 - (Forms)
 - Complaint Instruction Sheet
 - Sample Complaints and Answers
 - Blank Complaint Form
 - (Guides)
 - Examples of Conduct Prohibited and Rights Protected by the Acts
 - Elements of Proof Required in Selected Types of Complaint Cases
 - Resources for Complaint Case Research

- B. Practices employers are prohibited from engaging in under MERA include:
- interference, restraint, coercion of employees in exercise of their rights, by, for example, [independent violations of Sec. 111.70(3)(a)1, Stats.]
 - threats of reprisal
 - interrogation
 - promises of benefit
 - surveillance
 - domination or interference with administration of labor organization [111.70(3)(a)2]
 - discrimination based at least in part on union attitudes or activities [111.70(3)(a)3]
 - failure to bargain in good faith with majority representative [111.70(3)(a)4]
 - refusal to meet at reasonable times and places
 - refusal to deal with designated representative(s)
 - refusal to discuss mandatory subjects of bargaining
 - refusal to reduce agreements reached to writing
 - unilateral changes in status quo mandatory subjects, absent a valid defense
 - bypassing the union by bargaining with employees individually
 - refusal to provide requested information relevant/necessary to bargain or contract
 - totality of conduct demonstrating lack of good faith in bargaining
 - violation of collective bargaining agreement [111.70(3)(a)5] including:
 - refusal to submit grievances to final and binding arbitration
 - refusal to comply with final and binding grievance arbitration award
 - noncompliance with other terms of a collective bargaining agreement
 - failure to implement a lawful Sec. 111.70(4)(cm), Stats. interest award [(3)(a)7]
 - failure to give effect during hiatus to expired cba grievance arb [111.70(3)(a)8]
 - failure to give effect during hiatus to expired cba fair share [111.70(3)(a)9]
- C. Practices employees or unions are prohibited from engaging in under MERA include:
- restraint or coercion of employees in the exercise of their rights [111.70(3)(b)1]
 - failure of majority representative to fairly represent employees [111.70(3)(b)1]
 - causing municipal employer to commit prohibited practice [111.70(3)(b)2]
 - failure of majority representative to bargain in good faith with employer [(3)(b)3]
 - refusal to meet at reasonable times and places
 - refusal to deal with designated representative(s)
 - refusal to discuss mandatory subjects of bargaining
 - refusal to reduce agreements reached to writing
 - unilateral change in status quo mandatory subjects, absent a valid defense
 - refusal to provide requested information relevant/necessary to bargain or contract
 - totality of conduct demonstrating lack of good faith in bargaining
 - majority representative violation of collective bargaining agreement [(3)(b)4]
 - refusal to submit grievances to final and binding arbitration
 - refusal to comply with final and binding grievance arbitration award
 - noncompliance with other terms of a collective bargaining agreement
 - failure to implement a lawful Sec. 111.70(4)(cm), Stats. interest award [(3)(b)6]
 - failure to give effect during hiatus to expired cba grievance arb [111.70(3)(b)7]
 - strikes in municipal sector:
 - are not prohibited practices enforced by the WERC

-are subject to court injunction and penalties under Secs. 111.70(7) and (7m)

D. Employee rights under Sec. 111.70(2) of MERA include the rights:

- to join, form, assist labor organization
- to bargain collectively about mandatory subjects of bargaining via representatives selected by majority of employees
- to engage in other lawful concerted activities for mutual aid and protection
- to refrain from such activities

E. Employer rights under MERA include the rights:

- to make level of service and various other key decisions regarding the management and direction of the governmental unit or other employer free of mandatory bargaining about the decisions themselves (and subject only to the duty to bargain about the impact of those decisions on employee wages, hours or other conditions of employment)
- to have management interests balanced against employee interests in determining whether employee rights are being interfered with, examples:
 - no solicitation rules;
 - right to representation in investigative interviews.
- to exercise free speech (but not including threats of reprisal or promises of benefit)

F. additional complaint-related topics:

- parties' options regarding conciliation and the scheduling of a hearing
- relationship of complaint procedure to contractual grievance procedures
 - exhaustion required re claims covered by existing or expired contract
 - exceptions: duty of fair representation violated or gr procedure repudiated
 - initial deferral to arbitration – requires waiver of procedural defenses
 - ultimate determination whether arb outcome is repugnant to statute
- remedies available in complaint proceedings

G. for more information -- complaint case research resources

- Statutes and Rules [<http://werc.wi.gov/index.htm#Statutes>]
- Manuals
 - Complaint Process booklet [http://werc.wi.gov/complaint_process_booklet.htm]
 - Complaint Examiner Manual [http://werc.wi.gov/hearing_examiner_complaint_manual.htm]
- Digests (of decisions of WERC examiners, commission and related court)
 - Private Sector 1939-1988 [http://werc.wi.gov/combined_wepa_digest.htm]
 - Municipal Sector 1962-71, 1971-74 [http://werc.wi.gov/introduction_to_municipal_sector_digests.htm]
 - State Sector 1967-75 [http://werc.wi.gov/pre-selra_and_selra_digest_1967-75.htm]

- WASB CD-ROM [purchase from WASB.com]
 - Municipal Sector 1976-May 2002
 - State Sector 1976-May 2002
- WASB hard copy compilations for other years [purchase from WASB.com]

- Decisions search (WERC examiners, commission and related court)
 - WERC website via Ultraseek (1971-present, municipal to 1962)
[http://werc.wi.gov/searching_werc_website.htm]
 - Wisbar website (July 1989-present) [www.wisbar.org]
 - Westlaw (2006-present) [purchase access from Westlaw.com]

- Decisions lists (WERC examiners, commission and related court)
 - WERC website [http://werc.wi.gov/decisions_pdf_archive_intro.htm]
 - WisBar index [www.wisbar.org]

- Wisconsin Appellate Court decisions and related resources
 - Supreme Court via WisBar (1993-present) [www.wisbar.org]
 - Court of Appeals via WisBar (1993-present) [www.wisbar.org]

- NLRB decisions and digest/index search (1992-present) [www.nlr.gov]

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